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No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CAROL M. PARKS, an Individual and as Natural Mother, Guardian and Next Friend of JACK BERCAW "CORKY" WILLIAMS,

Petitioner,

-Against-

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE

ELEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

Petitioner's counsel of record:

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QUESTIONS PRESENTED

When the inability of a trial court to resolve any of the contested issues presented to it indicates that it has failed to complete its adjudicative process, thereby preventing the appellate court from fulfilling its statutory duty to provide a proper review of the trial court's decision, are Plaintiffs entitled to a remand for proceedings under Fed. R. Civ. P. 52(a)?

PARTIES TO THE PROCEEDINGS

The caption of the case in this court contains the names of all parties.

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OPINIONS BELOW

All opinions in this case by the courts below are unreported.

The memorandum decision of the United States District Court for the Northern District of Florida, Parks v. United States, PCA 79-0431 (ND Fla. Jan. 22, 1981), is set forth and attached in the appendix at 1 - 30. The decision of the United States Court of Appeals for the Eleventh Circuit, Parks v. United States, No.81-5315 (11th Cir. Aug. 9, 1982) is set forth and

attached in the appendix at 32. The Eleventh Circuit's denial of rehearing Parks v. United States, No.81-5215 (11th Cir. Oct. 5, 1982), is set forth and attached in the appendix at 33 - 34.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. section 1254(1) (1976). The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on August 9, 1982. An order denying petitioner's motion for rehearing was entered by the United States Court of Appeals for the Eleventh Circuit on October 5, 1982.

FEDERAL STATUTES

Federal Rules of Civil Procedure, Rule 52:

"(a) EFFECT. In all actions tried upon the facts without a jury or with an

advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgments shall be entered pursuant to Rule 58; and in granting or refusing interrogatory injunctions the court shall similarly set forth the findings of fact and conclusion of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law

appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under rules 12 or 56 or any other motion except as provided in rule 41(b).

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to rule 59. When findings of fact are made in actions tried with the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

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STATEMENT OF THE CASE

Carol Parks (hereinafter Mrs. Williams) filed this Federal Tort Claims Act Suit (FTCA) for brain injuries suffered by her son Jack Bercaw "Corky"

Williams as a result of the negligent medical care provided at the Naval Hospital, Pensacola, Florida during labor and delivery on October 13, 1973. Jurisdiction was vested in the United States District Court for the Northern District of Florida by virtue of 28 U.S.C. 1346(b) et.seq. Appendix at 2. The case was presented to the court sitting without a jury, and the court filed its memorandum opinion on January 22, 1981 finding there was "credible, believable evidence that Mrs. Williams had hypoxia during labor causing Corky's cerebral palsy and that reasonable careful management would have resulted in its detection with injury being avoided by available medical procedures." Appendix at 26. Plaintiff did not prevail because the trial court found the evidence to be "evenly balanced," the Government's evidence also being

credible. Id. Following the decision the trial court refused to make further findings of fact and conclusions of law as requested by Plaintiff and denied Plaintiff's motions for the taking of additional evidence or a new trial. Order, March 19, 1981.

The trial court declined to make findings of fact on the major contested issues of the trial, namely whether the nurse practitioner should have listened for late decelerations which would have been the warning signs of fetal distress. These warning signs would have imposed a duty to perform an emergency caesarean section or take other measures available to prevent injury to the Plaintiff, Corky Williams. See Appendix at 3. The Court declined to make a formal finding of whether or not the standard of care imposed a duty to listen for late decelerations, the medically recognized

hallmark of fetal distress. However, the court did comment at the hearing on post trial motions that this should have been done. The court also declined to make a ruling on whether it in fact was done. The trial record clearly showed that was no effort made to listen for late decelerations.

The United States Court of Appeals for the Eleventh Circuit, affirmed the decision of the trial court based on the trial court's memorandum decision. Appendix at 32.

Because the trial court refused to make findings of fact on issues Petitioners considered critical to the theories of their case, petitioners cite the trial transcript to illuminate the factual background of their case.

Mrs. Williams entered the Pensacola Naval Hospital in labor early in the

morning of October 13, 1973, and was not examined by a physician until after her delivery several hours later. Tr. 32. The only persons attending Mrs. Williams' during labor and delivery were Nurse Practitioner LCDR Betsch and the labor room nurse, Mrs. Bodkin. As a naval dependent, Mrs. Williams necessarily relied on Navy personnel to provide her health care. The Plaintiffs' credible, believable evidence documented that Mrs. Williams' labor had multiple risk-creating abnormalities: 1) She had an elevated blood pressure and excessive weight gain which Plaintiffs' experts diagnosed as toxemia or pre-exlampsia. Tr. 661-64, 611-15. 2) Mrs. Williams' had a labor contraction pattern that was abnormally rapid with contractions coming every one and one half to two minutes, lasting 45-55 seconds. Plaintiffs' experts characterized this as risky and

predisposing to oxygen deprivation in the unborn child. Tr. 633. 3) Mrs. Williams' second stage of labor was prolonged beyond two hours. Tr. 644. The credible evidence from both Plaintiffs' experts and the delivering nurse was to the effect that if complications were present, the baby would be at risk of brain damage from hypoxia. Tr. 757; Bodkin depo. 32-3.

In order to detect the early warning signs of hypoxia, it was necessary to monitor the baby's fetal heart rate to detect the presence of "late decelerations". Tr. 506, 6076-08. The nurses in attendance did not evaluate for late decelerations of the fetal heart tones. Betsch depo. 175; Bodkin depo. 35-6.

Mrs. Williams was managed through labor by a nurse which the government characterizes as an obstetrical nurse

practitioner. She did not have the requisite training and qualifications to be licensed as a Certified Registered Nurse Midwife. Tr. 1026. She had completed a ten month Navy course in obstetrics and was then assigned to duty at Pensacola. Tr. 1092-93. The original twelve month course was shortened to ten months because of budgetary considerations. Meriwether depo. 111. The Navy had promulgated regulations for Navy nurse practitioners because they were not trained to handle complicated or high risk patients and were expected to obtain expert medical help whenever complications occurred. Tr. 1663, 1665; Mem. Op. 2.

The Plaintiff, Corky Williams, was diagnosed to have cerebral palsy eight months after he was born. Mem. Op. 1.

It was uncontroverted that the nurse practitioner did not keep adequate

medical records of the labor and delivery in accordance with the standards that she had been taught in her training, nor in accordance with the standards of prudent obstetric practice. Mem. Op. 12; Tr. 2320.

ARGUMENT

REASONS FOR GRANTING CERTIORARI

This court is being asked to exercise its power to police the actions of trial courts when they fail to follow the mandates of the Federal Rules of Civil Procedure.

The decision of the Court of Appeals for the Eleventh Circuit to accept the inadequate decision of the United States District Court for the Northern District of Florida in this case is in direct conflict with the decisions of this Court and other courts of appeals.

The District Court failed to fulfill its judicial function by failing to make

findings of fact and set them out in writing as required by Rule 52(a). In a factually complex case the District Court failed to follow the accepted and required steps needed to properly resolve conflicting evidence and allow the proper appellate review of the trial court's decision.

The acceptance of the District Court's memorandum decision by the Court of Appeals was a sanctioning of the District Court's departure from the accepted and usual course of judicial proceedings concerning Rule 52(a) requiring this Court's review.

This failure to enforce the judicially refined guidelines of Rule 52(a) by the newest United States Court of Appeals could have serious repercussions. It is paramount to the rights of federal litigants in the Eleventh Circuit that the district courts

within that jurisdiction are not led to believe that Rule 52(a) is unimportant to their reviewing court. This Court has long recognized that only through strict compliance with Rule 52(a) by the district courts can the statutory right of review of every federal litigant be protected by the Courts of Appeals.

In affirming the decision of the District Court, the Court of Appeals has rendered a decision in conflict with the decisions of this Court and other courts of appeals. It has been well recognized that the appellate court cannot perform its statutory duty of review when the mandates of Rule 52(a) have not been followed. The decision of the District Court below contains a number of the characteristics that prevent proper review. The decision is a mixture of the District Court's observations and recounting of some of the positions of

the parties. The court selected the areas to comment upon, but declined to make findings upon the issues that the Plaintiff represented as being the paramount issues. The decision contains only conclusory determinations. There are no subsidiary or preliminary findings explaining the District Court's factual basis for its decision.

A. ADHERENCE TO THE MANDATES OF RULE 52(a) IS NECESSARY TO INSURE THAT THE ADJUDICATIVE PROCESS HAS BEEN CARRIED TO COMPLETION

The mandate of Rule 52(a) of the Federal Rules of Civil Procedure is clear. A United States District Court Judge sitting without a jury must make specific findings of fact according to the evidence presented.

The connection between compliance with Rule 52(a) and the adjudicative process is well recognized by this Court and the United States Courts of Appeals.

United States v. Merz, 376 U.S. 192, 198 (1964); United States v. El Paso Natural Gas Company, 376 U.S. 651, 656 (1964); Curtis v. Commissioner, 623 F.2d 1047, 1050 (5th Cir. 1980); Garter-Bare Co. v. Munsingwear, Inc., 650 F.2d 975, 980 (9th Cir. 1980); United States v. Horsfall, 270 F.2d 107, 109 (10th Cir. 1959); United States v. Forness, 125 F.2d 928 (2d Cir.), cert. denied 316 U.S. 694 (1942).

It is of the utmost importance to the judicial process that the trial court expend the time and effort to set forth the subsidiary findings of fact which support its ultimate conclusions. The adjudicative process requires this disciplined and structured approach to the resolution of the contested issue. Only through the strict compliance with the demands of Rule 52(a) by the trial court will the appellate court be able

to properly discharge its statutory duty of review.

The duty to use extreme care in making findings of fact has been long recognized by the intermediate appellate courts of the United States. United States v. Forness, 125 F.2d 928, (2d Cir.), cert. denied 316 U.S. 694 (1942). Judge Frank's assessment of the importance of a judge's fact finding duty set forth in United States v. Forness, has been readily accepted by this Court and others. Merz, 376 U.S. at 198; Curtis v. Commissioner, 623 F.2d at 1050-51 ; Golf City, Inc. v. Wilson Sporting Good Co., Inc., 555 F.2d. 426, 432-34 (5th Cir. 1977).

Judge Frank stated:

> We stress this matter because of the grave importance of fact-finding. The correct finding, as the near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found.

An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked, 'An unscrupulous administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principles." That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And Chief Justices Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards.

It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose--that of evoking care on the part of

> the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous,' no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be. (footnotes omitted)

United States v. Forness, 125 F.2d at 942-43.

A more important situation does not exists for unwavering adherence to Rule 52(a), than in the case placed now before this Court. As a military dependent,

Mrs. Williams sought her obstetrical care from a military hospital. As a result, her opportunity to place her grievances before a jury of her peers has been legislatively denied under the Federal Tort Claims Act[1] (hereafter FTCA).

A 1976 amendment to the FTCA made the act the exclusive civil remedy for persons injured as a result of an armed forces medical care provider's negligent acts. 10 USC section 1089 (1976 and Supp. V 1981). It also incorporated the FTCA provision denying a jury trial. 28 USC sections 2402 and 1346(b) (1976).

The denial of the opportunity to have the facts found by a jury, places an even greater importance on the fact finding duty of the District Court Judge

[1]The provisions of the Federal Torts Claims Act originally enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat 842, are now scattered throughout various sections of the United States Code, primarily 28 USC 1346(b), 1402(b) and 2671 - 2680.

involved. The expectancies created by Rule 52(a) must be protected in situations where the Plaintiff had no choice in accepting the judge as trier of fact.

In this case the record shows that the trial court was unable to make findings of facts based on the evidence presented at the trial, and declined to make the requisite findings requested by Plaintiff.

In his Memorandum Decision, attached as Appendix A, the trial court stated:

> There is a sharp conflict in the medical evidence whether the cerebral insult occurred during labor and delivery, whether hypoxia caused the cerebral insult, and whether those in charge of and managing the pregnancy, labor and delivery either caused or failed to prevent the injury to Corky.*
>
> *There is one conclusion that may be properly considered as established by the evidence, and it may be phrased as follows:
>
> Notwithstanding the tremendous advances made in medical knowledge, the field of medicine is still such an uncertain science that, in a case of this nature, knowledgeable

experts can entertain and have completely divergent opinions.

Appendix at 4 and 28.

The court found itself in the position of being unable to resolve the conflicting testimony. Instead of weighing the credibility of the witnesses, examining the discrepancies and inconsistencies of the testimony and considering the biases of the witnesses in order to reach factual determinations, the court based its final decision on the legal proposition of burden of proof.

The resolution of factual disputes in a medical malpractice case requires the trial court to make findings of fact on two specific types of issues.

The first is a finding of what the standard of care required be done in a given factual circumstance. Classically, this has been the province of the opinion testimony of expert witnesses who have

described what should be done and the reasons therefore. The trier of fact must make a finding as to what the standard course of conduct should be when faced with a specific medical problem. It is a rare circumstance where the court can reasonably find that there is no standard of care. The trial court should have weighed the evidence and made a determination as to what the nurse practitioner should have done.

The heart of the instant case relates to the failure of the nurse practitioner to properly examine Mrs. Williams to determine the baby's condition during the labor and delivery. The Plaintiff claimed that these examinations constituted the ordinary standard of care. In this case, additional risk factors created an even greater obligation to check for late decelerations. The nurses should have

listened to the changes in the baby's heart rate and related it to the mother's labor contractions to ascertain whether late decelerations were present which persisted beyond the end of a labor contraction. This drop in the baby's heart rate was tantamount to fetal distress caused by hypoxia which would warn of developing brain damage.

In the present case, the issue related to whether or not the nurse practitioner should have examined and measured for late decelerations, either by electronic fetal monitoring or with a specialized stethoscope called a fetoscope; or whether there was no obligation to listen for late decelerations. There was credible proof that an electronic fetal monitor was available at this hospital which was not used on this patient, and the Plaintiff specifically asked the court to make a

determination as to whether:

a) the standard of care required the practitioner to listen for late decelerations; and

b) whether the standard of care required that an electronic fetal monitor be used, or whether listening with a fetoscope would suffice.

The trial court declined and refused Plaintiffs' motion to make a specific finding on what the standard of care required, although the court did state at the post-trial motions that Navy personnel should have listened for late decelerations. The court declined to make a finding on whether or not the standard of care required the use of electronic fetal monitoring, as opposed to listening with a fetoscope. However, that was not determinative of the case because the record was clear that neither was done.

The trial court in its memorandum decision discussed the high risk factors which emphasized the requirement of listening for late decelerations, but was unable to arrive at a decision as to whether those risk factors were present. See below. The court applied circular reasoning in concluding that the evidence of whether there was a complication, such as preeclampsia or toxemia, was inadequate, but the thrust of the Plaintiffs' complaint was that the nurse practitioner failed to collect the information, i.e., by listening for late decelerations, that would have solidly proved its presence. Plaintiff was thus forced to rely on inferential rather than direct evidence because of the Government's negligent actions.

The risk factors that Plaintiff had alleged were present were not essential to Plaintiffs' allegation that the

standard of care required that the nurse practitioner should have listened for late decelerations or used the electronic fetal monitor. Plaintiffs' evidence was to the effect that the standard of care required this assessment regardless of whether the risk factors were present, and the fact that the risk factors were present made the need for such monitoring more imperative.

The trial court in this circumstance thus declined to make a crucial finding on what the standard of care required, thus precluding the Plaintiff from an appellate review of the sufficiency of the evidence, even though the trial court's comments suggest that he would have been forced to favor the Plaintiff.

A second matter regarding the standard of care related to the obligation of the nurse practitioner to secure consultation and examination by a

physician when Mrs. Williams came to the hospital in labor. The Navy regulations offered into evidence required that a nurse practitioner obtain a routine evaluation from a physician when the woman came in. This admittedly was not done.

The Navy regulations regarding this physician-substitute also required that consultation be obtained whenever there were any warning signs of any complications or matters that might reflect a high risk. In the present instance, the Plaintiff complained that there were warning signs of high risks involving preeclampsia or toxemia, labor contractions that were too close together, and of too long a duration, and of a secondary arrest in labor.

If there had been warning signs that any of these high risk factors were present, then admittedly the nurse

practitioner had an obligation to obtain consultation from an obstetrician. In the instant case, the conclusion as to whether each of these high risk was present was hotly contested. However, there was no dispute as to whether the warning signs were present, and there was solid evidence requiring the less skilled nurse practitioner to get consultation when the warnings were present because she was not fully qualified to make the sophisticated diagnosis that might be involved.

Again the trial court applied circular reasoning to its decision. It concluded that the evidence was conflicting as to whether or not these complications were present, thus circumventing the question of whether or not the more skilled observer with a greater knowledge or training should have been called when the warning signs were

admittedly seen. By failing to secure the services of the fully trained obstetrician, there was a failure to collect the information that the more skilled observer would have found. This begged the question of whether or not there was a breach of the standard of care requiring that the obstetrician be called to make the observations. Again, the trial court declined to make a finding on what the standard of care required.

In a similar vein, the trial court considered and failed to make findings of fact on the factual circumstances of what actually happened in the labor and delivery. It is essential in a malpractice case to apply the facts of what happened to the standard of care in order to determine whether or not there was tortious conduct. It was essential to the proper resolution of this trial

for the court to decide from the evidence what happened.

There was one matter of fact that was not in conflict in the instant case. This related to the question of whether or not the nurse practitioner or the labor room nurse listened for late decelerations. The testimony of both of these witnesses was before the court and it was clear that neither listened for late decelerations at any time during the labor or delivery. Obviously, if the standard of care had required that they listen for late decelerations, and if they failed to make such an assessment then the breach of that duty was negligent conduct. In the instant case, the trial court absolutely refused to make a finding on whether or not the Navy personnel had listened for late decelerations. The court's failure to make a finding has thus blocked Plaintiff

from a comparison of the conduct of the personnel with the standard of care in order to arrive at an ultimate decision in the case.

This failure to listen for late decelerations was crucial to the course of conduct which the Navy personnel followed. Plaintiffs' experts testified that, based upon the recorded drop in the heart rate from 136 to 120, late decelerations, in their opinion, were present, and that the baby was in distress, suffering from hypoxia which caused his brain damage and cerebral palsy. If the nurses had evaluated for late decelerations and had taken the appropriate action, the baby would have been delivered by caesarean section at an early point in time before brain damage had occurred.

The Government now relies upon its own failure to obtain the measurements

for late decelerations as a defense to this case by claiming that there was insufficient proof that late decelerations were present to prove either negligence or causation. In fact, the failure to do so was the result of the Navy's own negligent course of conduct.

The government now relies upon the trial court's conclusions that there was a massive conflict in the evidence while soft-pedaling over the fact that the volume and sufficiency of the evidence was choreographed by the initial negligence in failing to collect the information and in failing to secure a physician to make the necessary observations.

The trial court did not make one finding of fact concerning what actually happened during the delivery of Corky Williams. An example of the trial

court's inability to resolve basic factual issues is its treatment of evidence presented concerning Mrs. Williams' blood pressure baseline. Concerning this issue the trial court stated:

> For example, it is necessary to establish the mother's blood pressure baseline in order to determine if the blood pressure is elevated. There was disagreement over Mrs. Williams' blood pressure baseline. Further, assuming a baseline could be established, there was conflicting testimony on how one determines the blood pressure is elevated and on how long the blood pressure remained elevated.

Appendix at 7.

The trial court recognized the medical importance of establishing a baseline blood pressure in the management of an obstetrical patient. However, it failed to carry out its fact finding duty by making a determination of what the proper blood pressure baseline was for Mrs. Williams and the medical standard

for determining elevated blood pressure. Both of these facts existed. Mrs. Williams had a baseline blood pressure. The standard of medical care in the community recognized a method for determining elevated blood pressure. Yet the trial court was unable to resolve the conflicting evidence to make findings of fact on either of these critical issues.

The Plaintiffs presented evidence that a number of injury causing mechanisms were present during Corky Williams' birth. These included preeclampsia, an abnormal length of labor and the contraction pattern experienced by Mrs. Williams. None of these issues were resolved by the trial court.

Concerning the existence of preeclampsia the court stated:

> Before this court there was presented credible, believable, evidence supporting findings of preeclampsia, of no preeclampsia, and of preeclampsia so mild that it would not indicate an injurious condition.

The evidence submitted precludes a finding that it appears from the preponderance of the evidence preeclampsia existed.

Appendix at 7 - 8.

Concerning the length of contractions the court stated:

> There was total disagreement among witnesses testifying whether Mrs. Williams' contractions were abnormal. The conflicting evidence once again precludes a finding that it appears from a preponderance of evidence. The contractions were a contributing cause of Corky's injury.

Appendix at 11.

Concerning the length of labor the court stated:

> Again, the credible, believable evidence is in such conflict that it cannot be said it appears from the preponderance of the evidence that there was a prolonged second stage of labor which reasonably should have been recognized and could have been avoided and that the failure to do so was a contributing factor to hypoxia and to Corky's injury.

Appendix at 10.

And, as to the cause of the injury the court stated:

> His (plaintiffs witness) testimony was also credible and believable. Again, there is a standoff in evidence - it does not appear from the preponderance of the evidence that the conclusion and opinion of defendant's witness is correct.

Appendix at 16 - 17.

In summary the court stated:

> Overall, and in summary, there is credible, believable evidence that Mrs. Williams had hypoxia during labor causing Corky's cerebral palsy and that reasonably careful management would have resulted in its detection with injury being avoided by available medical procedures. There is equally credible, believable evidence that Mrs. Williams did not have hypoxia during labor and that Corky's cerebral palsy resulted from some cerebral insult prior to labor, with its cause being unknown, and with there being no evidence it was caused by negligence of the government.

Appendix at 26.

The only factual finding made by the court was that credible and believable evidence was presented in support of each of Plaintiffs' major contentions concerning negligence and causation and that credible and

believable evidence was presented in opposition to them. A recitation of the arguments presented by the parties is no substitute for the findings of fact required by Rule 52(a). E.E.O.C. v. United Virgina Bank/Seaboard National, 555 F.2d 403, 405 (4th Cir. 1977).

In the face of conflicting medical testimony the Court abdicated its duty to make findings of fact as mandated by Rule 52(a), basing its decision instead on its inability to resolve the conflicting evidence.

Justice White recognized in United States v. Kubrick, 444 U.S. 111, 124 (1979), that a judge must decide the issues in medical malpractice cases after listening to a barrage of conflicting experts. It is the rule, rather than the exception, that these cases are complicated and hotly disputed. Id. Litigants for a case involving scientific

issues rightly expect the trial court to fulfill its judicial duty by resolving conflicting expert testimony with the same specificity as Rule 52(a) requires in other civil actions. Hazeltine Corp. v. Crosley Corp., 130 F.2d 344, 349 (6th Cir. 1942).

The District Court Judge below failed to complete his judicial function of making factual determinations. The memorandum opinion of the court recounts the conflicting testimony rather than setting forth factual findings. The making of specific factual findings as contemplated by Rule 52(a) is a necessary step in the mental process of reaching a rational decision.

It is of the utmost importance to the judicial process that the trial court expend the time and effort to set forth the subsidiary findings of fact which support its ultimate conclusions. The

adjudicative process requires this disciplined and structured approach to the resolution of the contested issue. Only through the strict compliance with the demands of Rule 52(a) by the trial court will the appellate court be able to properly discharge its statutory duty of review.

B. THE FEDERAL STATUTORY RIGHT OF APPELLATE REVIEW CANNOT BE COMPLETED WHEN THE TRIAL COURT HAS FAILED TO FULFILL ITS RESPONSIBILITIES UNDER RULE 52(a).

The Supreme Court has stated that compliance with Rule 52(a) "is of the highest importance to a proper review" in connection with the granting or denying of a preliminary injunction. Mayo v. Lakeland Highland Canning Co., 309 U.S. 310, 316 (1940). A final determination of a trial court in a case tried without a jury deserves the same attention to the mandates of Rule 52. In the absence of these necessary findings "the courts were in no position to exercise the 'informed

independent judgment' necessary to the discharge of their statutory duty" Kelley v. Everglades District, 319 U.S. 415, 418 (1942). The trial court's failure to make adequate findings of fact and conclusions of law in the present case make it impossible for this Court to effectively protect the legal rights of the parties involved.

The United States Court of Appeals for the Eleventh Circuit's affirmance of the trial court's judgment based on the memorandum decision of the trial court is a realization of Judge Frank's fears expressed above concerning the impregnable nature of a court's findings of fact under Rule 52(a).

The trial court below failed to resolve any conflict in the testimony of the witnesses. On every issue the trial court concluded that the conflicting testimony made it impossible to make a

finding of fact on that issue. The trial court failed to fulfill its duty as a fact finder by resolving conflicting testimony.

This failure in turn prevents an appellate review of the legal standards applied by the district court to the facts. The petitioner respectfully urges that the District Court erred in its application of the legal standards as to neglect and to causation. However, those questions could not be gracefully and precisely raised before the appellate court without the trial court making the findings of fact required by Rule 52(a).

The petitioner was left with the impossible burden of trying to convince a busy appellate court to review a lengthy trial transcript in an extremely complicated case to ascertain the validity of petitioner's allegations of fact. Without a factual predicate, the

right to fair review of the legal standards of neglect and causation has been wrenched from petitioner. When the trial court refused to make a decision and failed to render findings of fact on the issues that petitioner raised in post-trial motions, it effectively blocked the appellate court from reviewing the decision.

This case of first impression involved of the military's program to substitute non-physicians for fully trained and certified specialists in providing health care to armed services dependants.

One underlying issue is how far military non-physician health care providers can go in cutting quality without imposing a higher obligation on the government for the consequences of avoidable adverse results.

When a non-physician military health

care provider breaches a duty to observe for crucial warning signs of medical problems and fails to keep proper documentation in a medical record of significant events in the labor and delivery, does that breach of duty in order to be enforced alter the burden of proof of an innocent, affected claimant?

These legal issues could not be properly reviewed by the appellate court because the trial court failed to resolve the factual issues of the case. It was impossible for the appellate court to review the trial court's application of law to fact, when the trial court failed to set forth findings on these crucial issues.

This medical record issue will directly affect every physician, nurse and substitute physician in federal employment and will by the weight of the influence of the decision affect every

physician, nurse and other health care provider in every hospital in the United States because of its effect upon liability in health care litigation.

Almost without exception, health care litigation in both the federal sector and in the private sector places heavy reliance upon the content of the medical records for both proving departures from the standards of appropriate conduct and for defending the care given as being appropriate under the circumstance. Among the many factors which make the medical records so important is the fact that frequently the claimant lacks the appropriate knowledge or training to make pertinent observations of what is happening in the health care and cannot, therefore, recognize the pertinent events that form the context for the claim or make the appropriate skilled examinations or

evaluations necessary for reasonable and prudent assessment. The patient is at the mercy of the health care provider to make the appropraite observations because of the providers skill and training. From the health care provider's view point, the problems of patient volume and information overload become crucial. A health care provider cannot reasonably be expected to remember all of the pertinent details of the care of every patient that he or she has attended. The medical record, therefore, becomes a primary source of information on care after memories have faded.

Petitioner complains of two separate aspects of this information collecting and recording process that were breached herein. The first is that the government failed to provide her with a skilled observer to make the pertinent observations that control the course of

her health care and would collect the information pertinent to a subsequent reconstruction of the events. In the present instance, the nurse who delivered the petitioner did not obtain the services or consultation of the physician who was on duty at the hospital as her backup in violation of the Navy regulations requiring a physician to do an admission examination and evaluation and that required continuing physician care in a complicated obstetrical course. Particularly pertinent to this claim was the failure to use electronic fetal monitoring equipment which was available at the hospital and would have been used by the consulting physician or alternatively, the failure to listen with a fetal stethoscope for the presence of late decelerations which would have proven the presence of fetal distress unequivocally. The trial court's

decision fails to mention either of these critical issues. In making its final determination on the case the trial court appears to have completely ignored the proof offered by Plaintiffs on these aspects of negligence.

Secondly, the delivering nurse breached her duty to preserve the information collected by maintaining a proper and appropriate medical record. The government conceded that the medical record was not kept in accordance with the standard of reasonable conduct. But the trial court felt this breach of duty had no effect on this case. Appendix at 25.

If there are no legal sanctions for the failure to perform what is termed a duty, there is by definition no duty because no consequences to the offender result from the breach.

The trial court's decision was

riddled with the judicially recognized inadequacies that prevent proper appellate review. Logic dictates that the Court of Appeals below could not have reviewed the trial court's decision with the exactness required by this Court and many courts of appeals.

The trial court below failed "to set down in precise words the facts" as the court found them. Instead the written decision is a conglomeration of the court's observations and recounting of the parties positions. This practice of commingling the findings of fact with other portions of the opinion has been recognized as an indication that the expectations of Rule 52(a) have not been met. Koehler v. United States, 200 F.2d 588, 592 (7th Cir. 1953). When statements of ultimate fact are mingled with arguments and extraneous views and advice, a proper appellate review can not

be accomplished. Daniel v. Washington County Board of Education, 488 F.2d 82,83 (5th Cir. 1973).

The trial court's opinion is made up entirely of conclusory determinations that credible, believable evidence existed on every key issue that prevented the court from making any specific factual findings. The court made no attempt to set forth any preliminary or basic facts which would have led to a disciplined determination of the ultimate facts of the case. This Court has stated that general conclusions of ultimate fact make it impossible to tell or ascertain the underlying facts that the trial court relied on and whether proper statutory standards were observed. Schneiderman v. United States, 320 U.S. 118, 129-30 (1943). Conclusory findings cannot be reviewed by the "clearly erroneous" standard as required by Rule 52(a).

United States v. 20.53 Acres of Land, 478 F.2d 484 (10th Cir. 1973), citing United States v. Merz, 376 U.S. 192.

When the trial court provides only conclusory findings, not illuminated by subsidiary findings or reasoning on all the relevant facts, the detail and exactness "on the material issues of fact necessary for an understanding by an appellate court of the factual basis" for the trial court's decision and for a rational determination of whether the findings of the trial court are clearly erroneous does not exist. E.E.O.C. v. United Virginia Bank/Seaboard National, 555 F.2d at 406.

In order for proper appellate review to take place, the findings of fact must be sufficiently detailed to allow the reviewing court to discern the trial court's underlying theories for its decision.

In the face of sharply conflicting expert testimony it is essential that the appellate court have the benefit of the trial court's assessment of the witnesses' credibility. Hazeltine Corp. v. Crosley Corp., 130 F.2d at 349. Rule 52(a) expressly recognizes the importance of the trial court's duty to "judge of the credibility of the witnesses."

In this case the trial court did not "judge of the credibility of the witnesses." The trial court's ultimate conclusions are based on its failure to determine which witnesses were most believable. The trial court's inability to resolve any of the ultimate factual issues stems from the impression that all the witnesses were equaly credible and believable, even though at times they took diametric positions.

Unless the fact finder explains which pathway it took through the maze of

conflicting evidence and opinions it is impossible for the appellate court to apply the "clearly erroneous" standard. Denofre v. Transportation Insurance, Rating Bureau, 532 F.2d 43,45 (7th Cir. 1976). United States v. 20.53 Acres of Land, 478 F.2d at 487.

When complex factual matters are dismissed in a conclusory manner or critical issues are not even given summary treatment, the reviewing court cannot be certain that the trial court has performed its judicial function. Ramey Construction Co. v. Apache Tribe, 616 F.2d 464, 467 (10th Cir. 1980).

In this case the trial court dismissed the complicated medical malpractice issues presented in two weeks of trial without making determinations of the witnesses' credibility and without supplying the underlying facts to support its conclusory determinations. The

proper course for an appellate court when the trial court's findings of fact are insufficient is to remand to the trial court for more specific findings. Daniel v. Washington County Board of Education, 488 F.2d 82, 83 (5th Cir. 1973); United States v. Northside Realty, 474 F.2d 1164, 1176 (5th Cir. 1973); Corder v. Kirksey, 585 F.2d 708, 715 (5th Cir. 1978).

In the case at bar the trial court ultimately ruled against Plaintiffs based on the Plaintiffs' failure to meet their burden of proof when the trial court was unable to adjudicate the credibility of the opposing witnesses. The trial court refused to consider and make additional findings of fact, which would have aided the court in its adjudicative process, dismissing Plaintiffs' motion summarily. The trial court also refused to allow the parties to present additional evidence

pursuant to Plaintiffs' motion, which would have allowed the court to resolve the deadlocked factual issues.

D. CONCLUSION

It has long been recognized in the federal courts that when a jury acts as the finder of fact in a case, the jurors must all agree on the outcome of the case. Masino v. Outbound Marine Corp., 88 F.R.D. 251, 252-53 (E.D. Pa. 1980). If a jury had been the fact finder in this case and they had reached the same impasse that the District court reached, the Plaintiffs would have been entitled to a new trial. In this case the District Court found itself unable to resolve the conflicting evidence and make factual determinations. In effect it was a hung jury. It is fundamentally unfair that the Plaintiff should be denied the opportunity to have the factual issues resolved in a new trial only because the

fact finding function was being carried out by a judge rather than a jury.

A jury is often left in the position of being unable to resolve critical aspects of the evidence because they are unable to ask questions necessary to clarify a witness' testimony. However, in this case, the transcript of the trial clearly shows that the trial court took an active role interrogating witnesses, and asking questions beyond those asked by counsel in order to resolve ambiguities and doubts existing in the trial court's mind. Plaintiffs should not be harshly and unduly penalized in this case because the trial court failed to follow the mandate of Rule 52(a) which would have allowed it to make a disciplined and organized decision on the questions placed before it.

Judge Frank's synthesis should be applied to hold that only by the use of a

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Judge Frank's synthesis should be applied to hold that only by the use of a

disciplined and ordered approach to scrupulously set forth the findings of fact can a court meet its responsibility of ascertaining the facts. Otherwise the trial court may succumb to a strong first impression that would not bear the test of the facts as actually established by the evidence.

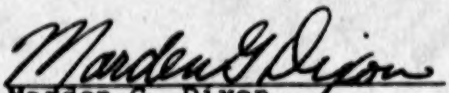
The District Court below did not expose its "impression" of how the case should be resolved to the refining light of the factual finding process of Rule 52(a). By not attempting to set forth the underlying factual basis on which that "impression" was formed, it was never tested against the facts as they were uncovered by the evidence.

These "impressions" were never subjected to the proper appellate review. This Court has determined that purely conclusory statements are of no value for proper appellate review. Dalehite v.

United States, 346 U.S. 15, 24 n.8(1953).

For the reasons stated above the Petition for Certiorari should be granted.

DATED this 3rd day of January, 1983.



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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CAROL M. PARKS, an Individual and as Natural Mother, Guardian and Next Friend of JACK BERCAW "CORKY" WILLIAMS,

Petitioner,

-Against-

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE

ELEVENTH CIRCUIT.

APPENDIX

Petitioner's counsel of record:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CAROL M. PARKS, an Individual
and as Natural Mother, Guardian
and Next friend of JACK BERCAW
"CORKY" WILLIAMS,

Plaintiffs,

vs. PCA 79-0431

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM DECISION

On October 13, 1973, Carol M. Parks, then known as Carol Williams, gave birth to a son, Jack Bercaw "Corky" Williams, at the Naval Hospital, Naval Air Station in Pensacola, Florida. Approximately eight months later, in June of 1974, Corky was diagnosed as suffering from cerebral palsy. Cerebral palsy is a type of brain injury causing physical impairment. As a result of cerebral palsy Corky is a

triplegic, meaning he has major paralysis in three of his four extremities.

In February of 1979, Carol M. Parks,[1] on behalf of Corky, brought an action for damages alleging Corky's injuries resulted from negligence on the part of the physicians and nurse practitioners who examined and cared for her during pregnancy and who assisted in the labor and delivery of Corky.[2]

Jurisdiction is vested in this court by virtue of 28 U.S.C. 1346(b) et. seq.

At trial there was testimony from Mrs. Williams, and from the physicians and nurse practitioners who were involved in the birth of Corky, and in post-delivery care. In addition, there was testimony from expert medical witnesses, including some midwives. Some of these witnesses actually examined Corky after his cerebral palsy was diagnosed and others testified on the basis of evidence

in the record. Some of the experts who testified are recognized as leading authorities in their fields.

Plaintiffs' contention is that Corky suffered brain injury as a result of lack of adequate oxygenation of his brain during labor and delivery. This condition is termed hypoxia.

Hypoxia in a fetus during labor and delivery is a known cause of cerebral palsy. Plaintiffs contend the physicians and nurse practitioners failed to recognize various prognosticators of this condition existing during pregnancy, labor and delivery. The evidence presented at trial established that certain remedial procedures, which were not undertaken here, may alleviate the danger caused by hypoxia.

There is no dispute that Corky has cerebral palsy. There is also agreement

that the cerebral insult which caused cerebral palsy occurred sometime during pregnancy. It further appears, by the preponderance of the evidence, that, if the cerebral insult took place during the period of labor and delivery, it resulted from hypoxia.

Beyond that, however, there is a sharp conflict in the medical evidence whether the cerebral insult occurred during labor and delivery, whether hypoxia caused the cerebral insult, and whether those in charge of and managing the pregnancy, labor and delivery either caused or failed to prevent the injury to Corky.[3] Compounding the problem presented by the conflict in medical evidence is the fact that a great many, if not a majority, of the causes of cerebral palsy are unknown.

Testimony at trial revealed that some of the known causes are hypoxia,

infections and viruses. Yet, even among the known causes, it is often extremely difficult to pinpoint the exact time when such cause arose.

In post-trial memoranda, the parties have extensively briefed and argued this case. They point out what are to them various discrepancies and inconsistencies in testimony, argue strenuously that, for various reasons, their evidence is believable, and contend the preponderance of the evidence supports their respective positions.[4]

While all contentions and arguments between the parties are not specifically discussed in this memorandum decision, all of them have been considered by the court in arriving at its conclusions.

Plaintiffs contend there was hypoxia during delivery and birth and that it resulted from a number of factors.

They contend Mrs. Williams suffered from a condition known as preeclampsia or toxemia. Preeclampsia creates a danger to the fetus by impairing the function of the placental transfer of oxygen to the fetus and imposes a risk of hypoxia.

Under the evidence there are three recognizable signs of preeclampsia. These are hypertension (elevated blood pressure), edema (excessive weight gain) and proteinuria (protein in the mother's urine).

While there was not unanimity of the witnesses on this point, it does appear from the preponderance of the evidence that a diagnosis of preeclampsia should be made if the mother has hypertension plus the presence of either edema or proteinuria.

Testimony at trial focused on whether Mrs. Williams had hypertension and edema. The medically trained

witnesses, however, were not able to agree on even the criteria for recognizing hypertension or edema. For example, it is necessary to establish the mother's blood pressure baseline in order to determine if the blood pressure is elevated. There was disagreement over Mrs. Williams' blood pressure baseline. Further, assuming a baseline could be established, there was conflicting testimony on how one determines the blood pressure is elevated and on how long the blood pressure must remain elevated. As to edema, it was apparent that some degree of edema is common in pregnant women and the evidence was inconclusive whether Mrs. Williams' weight gain during pregnancy could be diagnosed with reasonable medical certainty as edema indicating preeclampsia.

Before this court there was

presented credible believable evidence supporting findings of preeclampsia, of no preeclampsia, and of preeclampsia so mild that it would not indicate an injurious condition. The evidence submitted precludes a finding that it appears from the preponderance of the evidence preeclampsia existed.

In addition to contention [sic] respecting preeclampsia, plaintiffs submit additional risk factors were present and contributed to the end result.

Two of these factors relate to the length of pregnancy and delivery.

Plaintiffs argue Corky was a post-date baby and that, as a result, the placenta was not functioning at the end of pregnancy as well as it would have if Corky had been born sooner. They contend that the placenta's ability to transfer oxygen and nutrients was decreased and, thus, contributed to the cause of hypoxia

in Corky.

However, if Corky was post-date, it was probably only by one day and, because the date of conception is often not absolutely certain, from the evidence, he may not have been post-date at all. Furthermore, the evidence was inconclusive whether this placenta had, in fact, deteriorated.

Plaintiffs also contend the prolonged second stage of labor was a contributing factor to hypoxia.

Although, under the evidence, the second stage of labor may have been longer than normal, and perhaps should have been cause for concern, there was credible evidence from witnesses for defendant that Corky had a spontaneous birth and that such negated any possible complications arising from the length of labor. Again, the credible, believable

evidence is in such conflict that it cannot be said it appears from the preponderance of the evidence that there was a prolonged second stage of labor which reasonably should have been recognized and could have been avoided and that the failure to do so was a contributing factor to hypoxia and to Corky's injury.

Another risk factor presented by plaintiffs concerns the frequency and length of contractions during labor. When the uterus contracts, the blood supply to the fetus is either reduced substantially or completely cut off. The fetus must, therefore, obtain the oxygen and nutrients supplied by blood between contractions. A more frequent and longer contraction rate lessens the necessary renourishment period.

Under the evidence there is a possible risk from lengthy contractions.

However, there was total disagreement among witnesses testifying whether Mrs. Williams' contractions were abnormal. The conflicting evidence once again precludes a finding that it appears from a preponderance of the evidence the contractions were a contributing cause of Corky's injury.

The position of plaintiffs is not only that all these risk factors existed, but also that there was negligence resulting from a failure to recognize these factors.

The principal method under the evidence of determining fetal distress is by listening to the fetal heart rate. A fetal heart rate between 120-160 is considered normal and a reading below 120 raises the possibility of late deceleration. Late deceleration in the fetus means the heart rate is going up

and down and indicates the fetus is in distress and undergoing trauma of some sort.

Only five fetal heart rates were recorded during Mrs. Williams' labor and the last three readings were all at 120 beast per minute. Although plaintiffs contend that the heart date readings at 120 may not have been accurate, there is no evidence that they were not accurate. Furthermore, the heart rate dropped to 120 and stayed there. Under credible evidence submitted, these readings did not exhibit what one would expect if late deceleration existed.[5]

Thus, there is not sufficient basis under this evidence to justify a conclusion that it appears from the preponderance of the evidence the nurse practitioner should have assumed arrest in labor or late deceleration was occurring during labor and that the fetus

was in distress.

The evidence discussed so far relates to manifestations of hypoxia before Corky was born. At trial considerable additional testimony concerned Corky's condition after birth and later when cerebral palsy was diagnosed. It is, of course, plaintiffs' burden to establish, by the preponderance of the evidence, not only that defendant was negligent, but also that negligence was the legal or proximate cause of injury.

Under the evidence, the condition of a baby is determined within minutes after birth by calculating an "Apgar Score" which assesses the heart rate, respiratory effort, muscle tone, reflex, irritabilty and color. Although the Apgar Score measures relatively objective criteria, it is necessarily a subjective

test and can vary, depending on the evaluator.

Under the evidence, a possible Apgar Score ranges from 1 to 10 with 10 being the best score.

In this case Corky's Apgar Score was recorded as 8. Virtually every witness gave his or her opinion whether an Apgar Score of 8 was correct and what it meant in terms of hypoxia during labor and delivery. Some thought the score was correct, others thought it should have been lower. Some said a score of 8 meant injury occurring during labor was "inconceivable," others said a high Apgar Score does not rule out injury during labor.

The lack of consensus impels the conclusion by this court that, despite the medical value of an Apgar Score, it is of little probative value for the purpose of this decision.

There was evidence presented in this case respecting results of examination of Corky after he was born and after cerebral palsy was diagnosed. These studies are not determinative of the cause of injury. However, they reveal significant clues in regard to the question when the injury may have occurred.

The type of brain damage Corky suffered is relevant because it may indicate what stage in the development of the fetus injury occurred.

Two of defendant's expert witnesses stated that Corky had a deep-grained lesion which meant to them that the damage was done at a point in time much earlier than labor and delivery. In support of their opinions, both witnesses noted that Corky's head size was small in proportion to his body length, indicating

the insult to the brain earlier in pregnancy prevented the head from growing at the same rate as the rest of the body. Although neither witness was able to determine the cause of brain injury, both were certain that it did not occur during labor and delivery. Their testimony was credible and believable.

However, a witness for plaintiffs came to virtually the opposite conclusion. Based on his examination of Corky, he found that the brain damage was consistent with hypoxic trauma occurring very late in pregnancy, probably during labor and deliver. The opinion of this witness was that tests conducted ruled out every known cause of cerebral palsy other than hypoxia. He agreed, if injury occurred early in pregnancy, the head size would be small, but stated the size of Corky's head was normal at birth.

His testimony was also credible and

believable. Again, there is a standoff in evidence - it does not appear from the preponderance of the evidence that the conclusion and opinion of defendant's witness is correct.

As mentioned previously, various witnesses testified in regard to Corky's condition immediately after birth. However, additional testimony focused on Corky's condition after he was brought to the nursery following delivery.

There was evidence to the effect that, if the cerebral insult occurred immediately prior to birth, manifestation of such trauma would become apparent during the course of the child's hospital stay. The most obvious manifestations would continue for at least 12 hours after birth. There was some evidence that Corky did not suck well and may have been lethargic. However, it does not

appear from the evidence that Corky had the degree of depression that one would expect in a child who had hypoxia during labor and delivery.

Plaintiffs contend that under the evidence Corky was born with a very, very molded head and there is some evidence to that effect. Yet a doctor examining Corky following birth stated that the molding was so slight that he attached no significance to it.

In fact, the physician, Dr. Jones, did a new born examination of Corky 3 or 4 hours after birth and found him to be normal with no indication that there had been hypoxia during labor and delivery.[6]

Again the evidence presented in this respect is insufficient to justify a conclusion that it appears from a preponderance of the evidence Corky's cerebral palsy was caused by hypoxia occurring during labor and delivery.

Various other possible causes of cerebral palsy were mentioned during trial, including an automobile accident that Mrs. Williams was involved in early in her pregnancy with Corky. However, it is neither necessary nor possible for the court to decide, under the evidence here, how cerebral palsy resulted. The most that can be said is that the cause of Corky's cerebral palsy is unknown and, with that conclusion, it is apparent plaintiffs have not carried their burden of proof.[7]

The nurse practitioner in attendance at birth was CMDR. Betsch. There are some factual inconsistencies and discrepancies between her testimony and that of Mrs. Williams.

Mrs. Williams was under some sedation and in labor. Her testimony is somewhat suspect. As an example, she

testified that someone pushed on her abdomen during labor, a practice that, from the evidence, is not good practice and may cause damage. From all the evidence, this court concludes Mrs. Williams was in error in this regard.

CMDR. Betsch's testimony is also somewhat suspect. She, understandably, had no personal recollection of this delivery and, while she testified positively in some respects, her testimony had to be based largely on her customary practice. There were some contradictions in her testimony. In addition, there was not kept a complete record of birth that, under the evidence, should have been kept. Nevertheless, CMDR. Betsch was experienced and, to some extent, her testimony was corroborated by others involved during birth and afterwards. Some important records that were kept were also corrobative in

respects of her testimony.

Beyond that, the contention presented is that there was hypoxia during birth which should have been recognized and that called for care beyond that normally required. There is no contention that, assuming this labor and delivery to have been normal, the care provided, nonetheless, negligently produced injury.

As pointed out in this decision, it does not appear from a preponderance of the evidence that there was hypoxia during birth or that the delivery was other than a normal delivery.

It follows that it does not appear from the preponderance of the evidence that the care provided at birth by CMDR. Betsch, and others, was negligent with Corky's cerebral palsy being the proximate result of such negligent care.

Plaintiffs advance two legal arguments in their memorandum.

Labelling their contention as the "Value of a chance Doctrine," they contend that if negligence of a defendant reduces the possibility of a better outcome, or otherwise reduces the plaintiff's chances, the defendant can be held liable.

In so contending they have to extent placed their own construction upon the cases they cite. Beyond that, however, under the cases there must be found neligence before the contention, dealing as it does with proximate cause, can come into play. As pointed out in this decision, it does not appear from the preponderance of the evidence in this case that there was here negligence of the defendant or that there was a negligent failure of compliance with the usual standards of medical care that was

or might have been a proximate cause of injury.

Plaintiffs also contend that the government negligently failed to keep proper medical records with the plaintiffs' ability to prove causation thereby being affected and that such negligence on the part of the government relieves the plaintiffs of the burden of proof in this respect, or at least should shift that burden to the defendant.

Plaintiffs cite several cases which, as defendant points out, deal with situations not involving medical records and do not appear to have relevance here. The closest case to being on point, cited by plaintiffs, was a "spoilation of records" case where the physician could not locate the original records because they had been destroyed. The court in that case placed the burden on defendant

to prove that his negligence was not the cause of injury. Thor v. Boska, 38 Cal.App. 3d 558, 113 Cal. Rptr. 296 (3d Ct.App. 1974).

The rationale of the Thor case appears to be that, where there is a substantial probability that defendant's negligence was a cause of an injury and the defendant's negligence makes it impossible for the plaintiff to prove causation, the burden should shift to the defendant, Implicit in any such holding is that the defendant's failure or refusal to produce a record, or the destruction of it, raises some inference of guilt. 2 Wigmore, Evidence 291 (Chadbourn rev. 1979).

Assuming arguendo this holding presents viable law in Florida, there is here presented no similar factual situation. There does not appear from a preponderance of the evidence there is a

substantial probability that there was negligence on the part of the defendant that was a cause of injury. Moreover, there was no failure or refusal to produce records or any destruction of them. Under the evidence, the records that were available were produced and were not destroyed or discarded to prevent their being used in evidence. Under the factual situation here presented, this court has neither the inclination nor the right to place on defendant the burden of proof that rightfully belongs on plaintiffs.

The real question is not whether proper records were kept but whether proper actions were taken. There was placed in evidence the testimony of those in actual attendance at birth. They were fully examined and cross-examined. As pointed out herein, it does not appear

from the preponderance of the evidence that they were guilty of medical malpractice constituting negligence that was a proximate cause of injury.

Overall, and in summary, there is credible, believable evidence that Mrs. Williams had hypoxia during labor causing Corky's cerebral palsy and that reasonable careful management would have resulted in its detection with injury being avoided by available medical procedures. There is equally credible, believable evidence that Mrs. Williams did not have hypoxia during labor and that Corky's cerebral palsy resulted from some cerebral insult prior to labor, with its cause being unknown, and with there being no evidence it was caused by negligence of the government.

There is no evidence, nor do plaintiffs contend, that, if cerebral insult was suffered prior to labor, the

defendant is liable for injury resulting from it.

With the evidence so evenly balanced, plaintiffs may not prevail. They have not carried the burden upon them of showing liability of defendant by a preponderance of the evidence.

Judgment will be entered in favor of the defendant and against the plaintiffs with costs taxed against the plaintiffs.

DATED this 22nd day of January, 1981.

/s/
WINSTON E. ARNOW Chief Judge

FOOTNOTES

1In this decision, because Mrs. Parks was referred to by her prior name at various times, references are made under her former name of Mrs. Williams.

under her former name of Mrs. Williams.

[2]The Navy trains Navy nurse practitioners to deliver babies. Although nurse practitioners function in a manner similar to that of a midwife, nurse practitioners are not certified nurse midwives. Pertinent Navy regulations required a physician to be on call for all deliveries and nurse practitioners are not to manage complicated or high risk patients alone.

Both physicians and nurse practitioners examined and cared for Mrs. Williams during her pregnancy with Corky. A physician was on call during labor and delivery. However, only nurse practitioners were present at that time.

Despite the fact that a physician did not participate in this labor and delivery, the applicable standard of care is that of a fully trained obstetrician, rather than that of a nurse practitioner.

[3]There is one conclusion that may be properly considered as established by the evidence, and it may be phrased as follows:

Notwithstanding the tremendous advances made in medical knowledge, the field of medicine is still such an uncertain science that, in a case of this nature, knowledgeable experts can entertain and have completely divergent opinions.

[4]This court did not anticipate, and so initially put no limit on, the length of memoranda to be filed. Plaintiffs started the ball rolling by submitting a 191-page memorandum and defendant submitted, in response, a 69 page memorandum. Plaintiffs, after their

memorandum was filed, were required by the court to limit their reply memorandum to 25 pages of standard typographic printing. They so limited, but did so in noticeably smaller typing and page margins.

[5]Plaintiffs contend that it is an "old fashion standard" to consider a fetal heart rate between 120-160 as normal and that late decelerations may exist even if the heart rate is within that range; defendant argues to the contrary. Again, there is a substantial conflict in the evidence.

[6]In memoranda, plaintiffs' counsel, in zeal of advocacy have regrettably made what are to this court some unfounded assertions. In memoranda, defendant's attorney has, understandably, taken umbrage at some of them.

Respecting this witness, for example, plaintiffs' counsel say Dr. Jones obviously had to be sloppy in his practice and either did not recognize abnormalities which were noted or neglected to follow through and was inexperienced. While Dr. Jones did not have the experience of others testifying, he impressed the undersigned as being capable, credible and believable.

[7]To this layman judge, Capt. Meriwether's suggestion that in the automobile accident Mrs. Williams' abdomen may have come forcibly in contact with the door handle of the car, resulting in cerebral insult, possesses plausibility. But it was more or less speculation on her part, and other experts, though not questioned extensively regarding that possibility,

did not believe it was probable that the accident played a part in Corky's cerebral palsy.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5315

CAROL M. PARKS, an Individual and as Natural Mother, Guardian and Next Friend of JACK BERCAW "CORKY" WILLIAMS

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

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(August 9, 1982)

Before TUTTLE, RONEY and KRAVITCH, Circuit Judges.

PER CURIAM:

The judgment is affirmed on the basis of the memorandum decision of Honorable Winston E. Arnow, District Judge, dated January 22, 1981.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5315

CAROL M. PARKS, an individual and as Natural Mother, Guardian and next Friend of JACK BERCAW "CORKY" WILLIAMS,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA

Defendant-Appellee,

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 9, 11 Cir., 1982, F.2d).

(October 5, 1982)

Before TUTTLE, RONEY and KRAVITCH, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge

REHG-6